

REMARKS

These remarks are responsive to an Office Action of January 21, 2004. Claims 12, 13, 15-23 and 25-28 are pending in the present application.

The Examiner has rejected claims 12, 13, 16-23, and 25-28 under 35 U.S.C. § 103(a) as being unpatentable over Wallin et al. (U.S. Patent No. 4,623,542). Furthermore, the Examiner has rejected claim 27 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicant notes that the Examiner has not made a specific rejection or noted the allowability of claim 15. In response, Applicant respectfully traverses the above-mentioned rejections and requests reconsideration by the Examiner in view of the amendment above and the following remarks.

As previously mentioned, Examiner has rejected claims 12, 13, 16-23, and 25-28 under 35 U.S.C. § 103(a) as being unpatentable over Wallin et al. (U.S. Patent No. 4,623,542). Specifically, Examiner states that Wallin et al. "disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flower, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked." Examiner also stated that Wallin et al. "do not disclose using margarine, having pizza topping on the laminated crust and baking the laminated dough."

The Examiner has taken official notice of several asserted facts to supply some of the claim limitations not disclosed by Wallin et al. First, the Examiner stated it would have been obvious to use margarine instead of shortening because it is well known in the art to use shortening, butter, or margarine alternatively. Further, the Examiner stated that butter and margarine are more expensive than shortening and give different taste and nutritional factors

than shortening. Second, the Examiner stated that there is no identity standard to pizza because many types of toppings are used to form pizza, and that it would have been obvious to one skilled in the art to use a variety of filling to make different types of product. Finally, the Examiner stated that baking and frying are well known alternative cooking methods, wherein frying gives better texture but has the drawback of increasing the fat content, and that it would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content.

The Examiner bears the initial burden in establishing a prima facie case of obviousness when rejecting claims under 35 U.S.C. §103. In re Piasecki, 745 F.2d 1468, 223 USPQ 758 (Fed. Cir. 1985); In re Reuter, 651 F.2d 751, 210 USPQ 249 (CCPA 1981). If the Examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of non-obviousness.

To properly establish a prima facie case of obviousness, MPEP § 706.02(j) identifies three basic criteria that must be met. First, the prior art reference (or references when combined) must teach or suggest all of the claim limitations. Although official notice may be taken of facts outside of the record which are capable of instant and unquestionable demonstration as being “well known” in the art, applicants are allowed to traverse such notice and require the examiner to cite references or produce affidavits in support of the position taken. MPEP § 2144.03. Second, there must be some suggestion or motivation in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or combine reference teachings. Finally, there must be a reasonable expectation of success. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Examiner has not demonstrated all of the elements of the claimed invention, either within the prior art or by taking official notice. Each currently pending independent claim

calls for margarine layers to be distributed between layers of a proofed dough product. Wallin et al. proof the dough after the shortening lamination step. See col. 11 starting at line 64 (discussing proofing after lamination and before frying). It is believed that proofing of the dough before lamination reduces volume expansion of the dough after lamination, thereby reducing bready qualities and increasing crispiness qualities of the dough. Therefore, although the determination of patentability in product by process claims is based on the product itself, proofing the dough before lamination gives distinct and unexpected structural advantages over the prior art. Further, as stated in the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, “the step of proofing the dough *before* sheeting of the dough layers and the introduction of the smooth margarine also greatly affects the quality of the finished product.” See Bubar Declaration, paragraph 16 (emphasis in original). Hence, Examiner has not shown all of the claim limitations of the invention, either by prior art or by official notice, and has therefore not produced a *prima facie* case of obviousness.

Applicant respectfully traverses Examiner’s official notice that margarine, butter, and shortening are interchangeable. Using a dairy substitute such as margarine, or a dairy product such as butter, provides advantages over shortening in terms of taste and texture for a crispy crust suitable for microwave heating. This was at least partially suggested and acknowledged by the Examiner in the Office action when she stated that butter and margarine give different taste and nutritional factors than shortening. Further, the prior art cited by Examiner itself confirms this lack of interchangeability. Wallin et al. state that the roll-in shortening “may be any of the conventional hydrogenated vegetable oil shortenings available on the market,” and do not suggest utilizing anything other than vegetable oil based shortening as their fattening agent. See Col 10, lines 16-20. A primary objective of Wallin et al. is to provide a toaster pastry product which has a “flaky exterior surface and a bready interior.” See col. 2,

lines 20-25, and col. 11, lines 8-9. It is believed that the use of shortening contributes to such bready interior. For example, U.S. Patent No. 4,842,882 to Paulucci uses shortening as the fattening agent when a porous, bready quality is desired. It is also noted that the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, discusses the advantages of utilizing margarine rather than shortening flakes to avoid producing a bready interior. See Declaration at paragraphs 10-11. Therefore, the interchangeability of margarine like products and shortening is not a fact which is capable of instant and unquestionable demonstration as being “well known” in the art and, hence, all of the elements of the claimed invention have not been shown. Further, the use of margarine over shortening provides unexpected benefits in terms of the crispiness of the crust. Therefore, a *prima facie* case of obviousness has not been established.

Applicant also respectfully traverses Examiner’s official notice that baking and frying are well known cooking alternatives. Although this assertion may be correct for some casual food preparers, it does not hold true for mass production food processors or recipe formulators. Frying the crust allows the exterior surface in contact with the oil to become dry and flaky, while leaving the interior bready. Wallin et al. desire a pastry crust that has a flaky exterior surface and a bready interior, and fry their toaster pastry. See col. 2, lines 20-25 and col. 12, line 26. In contrast, the crust of the present invention has a crispy, non-bready quality throughout its interior. Baking the dough instead of frying the dough contributes to this crispy structure and helps to provide a crust suitable for use in a microwavable pizza. Therefore, although the determination of patentability in product by process claims is based on the product itself, baking the dough gives distinct and unexpected structural advantages over the prior art in terms of reducing bready qualities of the crust.

Further, the choice of whether to fry or bake depends on many factors besides the healthfulness of the food. Although increased fat content may indeed make a crust less healthy, it also changes important characteristics of the crust, such as its texture and feel. The frying step employed in Wallin et al. increases its total fat content by about 7% of the total weight of the cooked dough. See col. 10, lines 4-15. An increase of this magnitude will impart a greasy feel to the crust. Such a greasy feel may be acceptable, or even desired, in a filled pastry product. However, such a greasy feel is not desirable in baked laminated dough suitable for use as a pizza crust. Hence, because the interchangeability of frying and baking is not a fact which is capable of instant and unquestionable demonstration as being "well known" in the art, all of the elements of the claimed invention have not been shown. Further, baking the dough provides distinct and unexpected advantages over frying the dough in producing a crispy crust. Therefore, a *prima facie* case of obviousness has not been established.

Taken together, either alone or in combination, proofing the dough before lamination, utilizing margarine type products over shortening, and baking the dough rather than frying provide distinct and unexpected benefits over the prior art and official notices taken by Examiner. Specifically, these factors contribute to providing a crust that is crispy throughout its interior, rather than bready. Such a crust is suitable for use as a pizza crust, and is particularly suitable for use as a crust in a microwavable pizza.

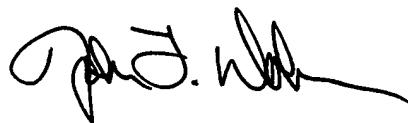
In addition, as previously mentioned, the Examiner has rejected claim 27 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, the Examiner has stated "the limitation 'to form a fatted sheet' is unclear because the fatted sheet is formed in the process for forming the final laminated crust; also it is unclear how the limitation ties in with the rest of the claim."

In response, claim 27 has been amended to overcome the §112, second paragraph rejection. It is noted that the amendment to the claims was only performed to further clarify the invention and does not narrow the limitations present in the amended claim.

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

Examiner is invited to telephone the undersigned if Examiner believes it would be useful to advance prosecution.

Respectfully submitted,



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